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No. 87-1653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN R. VARNEY and ROBERT J. HUGHES, JR.,
Appellants,

vs.

THE FLORIDA BAR, *et al.*,
Appellees.

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Whether the Supreme Court of Florida erred in holding that the principle of "one person, one vote" does not apply to elections of The Florida Bar Board of Governors.

If the principle of "one person, one vote" is applicable to elections of The Florida Bar Board of Governors, whether that principle is equally applicable to nonresident members of The Florida Bar as well as resident members.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings Below ii

Table of Contents iii

Table of Authorities iv

Motion to Dismiss or Affirm 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Reason for Dismissal or Affirmation 4

Conclusion 9

Appendix A—Rule 1-4.1, Rules Regulating The Florida Bar 1a

Appendix B—Rule 1-12.1, Rules Regulating The Florida Bar 2a

Appendix C—Rule 2-3.3, Rules Regulating The Florida Bar 3a

Appendix D—Integration Rule of The Florida Bar, Article XIII (1986) 5a

TABLE OF AUTHORITIES

Cases: Page

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 7

District of Columbia Court of Appeals v. Feldman,
460 U.S. 462 (1983) 5, 6, 8

Key v. Doyle, 434 U.S. 59 (1977) 5

Ohralik v. Ohio State Bar Ass'n,
463 U.S. 447 (1978) 7

Prentis v. Atlantic Coast Line Co.,
211 U.S. 210 (1908) 5, 6

In re Primus, 436 U.S. 412 (1978) 7

Rapp v. Committee on Professional Ethics & Conduct,
504 F.Supp. 1092 (S.D. Iowa 1980) 7, 8

In re Summers, 325 U.S. 561 (1945) 6, 7

Supreme Court of Virginia v. Consumers Union,
446 U.S. 719 (1980) 6

Constitutional and Statutory Provisions:

The United States Constitution, Article III, Section 2 7

The United States Constitution, Amendment 14 3

28 U.S.C. § 1257 ..... 1, 4, 5, 7, 9

28 U.S.C. § 2103 9

The Constitution of the State of Florida, Article V, Section 15 2

35 West's F.S.A. Rules Regulating The Florida Bar, Rule 1-12.1 . . . 6

Other:

Integration Rule of The Florida Bar, Article XIII (1986) 6

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Pursuant to Rule 16, Rules of the Supreme Court of the United States, Appellee The Florida Bar moves to dismiss this appeal or to affirm the decision of the Supreme Court of Florida for want of jurisdiction of this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal raises questions whether an amendment made by the Supreme Court of Florida to its Rules Regulating The Florida Bar is violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution with respect to apportionment of the governing board of that integrated state bar.

Appellants' Jurisdictional Statement cites the former rules on apportionment of The Florida Bar Board of Governors, at J.S. 2-4. The appendix to Appellants' Jurisidictional Statement, at J.S. A-7 to A-9 & A-13, sets forth the present rules on this subject as promulgated by the Supreme Court of Florida in the rulemaking proceeding appealed from in this action (App. A & C).

STATEMENT OF THE CASE

This proceeding began with a petition seeking amendments to the Rules Regulating The Florida Bar, filed in the Supreme Court of Florida because of its exclusive jurisdiction over that integrated state bar under Article V, Section 15 of The Florida Constitution.

The action was initiated on December 24, 1986 by a group of Bar members who sought changes to certain rules of the Supreme Court of Florida which specified how the Bar's Board of Governors was elected. At that time, the Bar's 42-member Board was composed of: one member elected from each of Florida's 20 judicial circuits; 14 additional circuit representatives elected from the state's more populous circuits; the President and President-elect of The Florida Bar; the President and President-elect of the Bar's Young Lawyers Division; two out-of-state Bar members; and two nonlawyer "public" members.

The original petition advocated a revised rule provision for reapportionment of The Florida Bar's Board of Governors whereby existing circuit representatives chosen by in-state Bar members would be elected according to the principle of "one lawyer, one vote." Among other features, the initial proposal made no provision for additional Board members to represent nonresident Bar members. The suggested rule

amendments were urged on the basis of public policy and this Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in various "one person, one vote" decisions.

Consistent with its practice in Bar rules matters, The Supreme Court of Florida allowed interested parties to participate in this proceeding. In addition to the original petitioners and The Florida Bar, the state supreme court received comments and memoranda from five other parties: The Florida Bar's Young Lawyer Division; one local bar association; a law school dean; one incumbent member of the Bar's Board of Governors; and the two nonresident members of The Florida Bar who are the appellants in this case. From within this group of seven separate parties, there were at least five distinctive proposals for amending the selection process and composition of The Florida Bar's Board of Governors.

Appellants generally argued that the "one person, one vote" requirement of the Fourteenth Amendment applied to the Board of Governors of The Florida Bar, and that important considerations of equity and fairness compelled the conclusion that such principle should apply equally to both resident and nonresident Bar members.

The Florida Bar maintained that reapportionment of its Board was not constitutionally required but submitted a proposal which increased the number of in-state circuit representatives elected by lawyers residing in the more populous areas and which added a third Board representative for the organization's out-of-state members.

On December 10, 1987, the Supreme Court of Florida amended its rules on apportionment of The Florida Bar Board of Governors, adopting a reapportionment formula consistent with that proposed by The Florida Bar. The Court's enabling

opinion indicated that the Board of Governors "should be apportioned fairly and should represent all of the Bar's members" (J.S. A-3). The court observed, however, that it was not required to apportion the Bar's Board in strict conformity with this Court's "one person, one vote" decisions, noting that they were inapplicable to a specialized entity such as The Florida Bar whose "powers are limited and directly affect members of a particular group, i.e., persons licensed to practice law in this state" (J.S. A-4).

On December 17, 1987, the Florida Supreme Court issued further clarifying amendments to its earlier opinion, making minor changes in the Board nomination and election process. Appellants filed a notice of appeal from this action, asserting jurisdiction with this Court under 28 U.S.C. §1257(2).

REASON FOR DISMISSAL OR AFFIRMATION

THIS ACTION SEEKS TO APPEAL AN AMENDMENT MADE BY THE SUPREME COURT OF FLORIDA TO ITS RULES REGULATING THE FLORIDA BAR, AND THIS COURT HAS NO JURISDICTION UNDER 28 U.S.C. §1257 TO REVIEW SUCH MATTERS RESULTING FROM A STATE COURT'S RULEMAKING PROCEEDINGS.

Under the terms of 28 U.S.C §1257, this Court's jurisdiction may be invoked to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Appeal is appropriate under 28 U.S.C. §1257(2) in any such matter "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." This appeal should be dismissed for nonconformity with both these provisions of the statute, which must be construed narrowly in the absence

of clear congressional intent to enlarge this Court's mandatory jurisdiction. *Key v. Doyle,* 434 U.S. 59,65 (1977).

The action of the Supreme Court of Florida in this case was no "judgment" or "decree" for purposes of 28 U.S.C. §1257, but merely the exercise by a state supreme court of its authority to amend its rules which regulate The Florida Bar as an official arm of that tribunal. Appellate jurisdiction of the United States Supreme Court does not embrace any direct appeal from such a rulemaking proceeding.

This court's opinion in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983) provides clear guidance that this appeal should be dismissed for want of jurisdiction. *Feldman* emphasizes that an appeal premised on 28 U.S.C. § 1257 is appropriate only if the state court proceedings at issue were "judicial" in nature. Quoting from its opinion in *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 226 (1908), this Court in *Feldman* emphasized:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end.

460 U.S. at 477.

The questioned action of the Supreme Court of Florida in this case was clearly a rulemaking proceeding initiated to amend certain provisions within the Rules Regulating The Florida Bar. Because that action sought review of a then-existing Bar rule and resulted in the adoption of a successor provision, it is further questionable whether the proceedings below could be properly characterized as having "drawn in question the validity of a statute" for purposes of 28 U.S.C. § 1257 when the statute at issue did not exist until rendition of the state court opinion which promulgated it.

This Court clarified the distinction between judicial and certain nonjudicial acts by reciting its analysis of rail passenger ratemaking in *Prentis*, quoted within the *Feldman* case:

> Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is making of a rule for the future, and therefore is an act legislative not judicial in kind.
>
> 460 U.S. at 477.

Furthermore, this Court has recognized that state supreme courts act in a nonjudicial, legislative capacity in promulgating rules regulating the bar. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980). The fact that the proceedings in which the appellants participated were conducted before the Supreme Court of Florida, in some adversarial manner, is not determinative; the nature and effect of the proceedings are controlling.. *In re Summers*, 325 U.S. 561, 566-7 (1945).

Appellants' involvement in the proceedings below, among appearances by others, was pursuant to Supreme Court of Florida rule which permitted the participation of interested parties on any petition regarding Bar rule amendments. Article XIII (Amendments), Integration Rule of The Florida Bar (App. D); Rule 1-12.1 (Amendments to rules; notice), Rules Regulating The Florida Bar (App. B).[1] In pleadings submitted to that court,

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[1]A substantially reformatted "Integration Rule of The Florida Bar," adopted by the Supreme Court of Florida in July of 1986, became effective on January 1, 1987. The original petition in the instant appeal was filed prior to the effective date of the restyled "Rules Regulating The Florida Bar" but sought amendment of the Board apportionment formula within the new rules. The amendment process under both sets of Bar rules allowed for participation by interested parties, and the Board's apportionment formula was the same under each rules compilation.

appellants proposed amendments of general applicability; they sought no particularized relief. Although appellants raised constitutional and public policy issues in their argument, it was done in the context of rulemaking.

Appellants cite three cases in support of their premise that jurisdiction of this Court is appropriate under 28 U.S.C. §1257(2): *Ohralik v. Ohio State Bar Ass'n*, 463 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In all these actions wherein this Court considered the constitutionality of state court rules regulating the legal profession, a lower court had made a particularized adjudication as to the impact of specific rules on an individual lawyer party.

This attempted appeal does not present this Court with a particularized dispute upon which its judicial power can act. Rather, it reflects "a desire for an abstract declaration of the law." *In re Summers*, 325 U.S. 561, 567 (1945). Appellants seek a direct appeal to this Court for essentially its advisory opinion regarding varying sets of legislative proposals. There is no "case" or "controversy" for purposes of Article III, Section 2 of the United States Constitution, so no appeal should be taken. *Rapp v. Committee on Professional Ethics & Conduct*, 504 F.Supp. 1092 (S.D. Iowa 1980).

Appellants challenge an amended state bar rule yet to be directly reviewed in a separate judicial proceeding. Their unnecessary recitation of the former Florida Bar rule on this subject, found within Appellants' Jurisdictional Statement at J.S. 2-4, is illustrative of the precise jurisdictional problem in such actions noted by the District Court in *Rapp*.

> If an appeal had been attempted, the United States Supreme Court would not have been presented with a particularized dispute upon which its judicial po-

> could act; rather, it would have been presented with two sets of legislative proposals. There was no "case" or "controversy," see U.S. Const. art. III, §2, so no appeal could be taken.
>
> 504 F.Supp. at 1098.

This Court's guidance in *Feldman* is emphatic that the appropriate forum for appellants' constitutional claim lies elsewhere.

> Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, the district court is not reviewing a state court judicial decision. In this regard, 28 U.S.C. §1257 does not act as a bar to the district court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States district court review of final state-court judgments are not implicated.
>
> 460 U.S. 483, 486.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction under 28 U.S.C. § 1257. Because the state court proceedings in question were nonjudicial in nature, there is no judgment or decree to alternatively support a petition for writ of certiorari under 28 U.S.C. § 2103.

Respectfully submitted,

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APPENDIX A

Rule 1-4.1, Rules Regulating The Florida Bar

1-4.1 *Composition of board of governors.* The board of governors shall be the governing body of The Florida Bar. It shall have fifty-one (51) members, fifty (50) of whom shall be voting members, and shall consist of the president and the president-elect of The Florida Bar, president and president-elect (who shall vote only in the absence of the president) of the Young Lawyers Division, three (3) representatives of the active members of The Florida Bar residing outside of the State of Florida, representatives elected by and from the active members of The Florida Bar in each judicial circuit, and two (2) residents of the State of Florida who are not members of The Florida Bar. There shall be one or more such circuit representatives from each judicial circuit who shall be apportioned among and elected from the judicial circuits on the basis of the number of members in good standing residing in each circuit. The formula for determining the number of additional circuit representatives apportioned to and elected from each judicial circuit and all other matters concerning election and term of office for members of the board of governors shall be prescribed in chapter 2.

APPENDIX B

Rule 1-12.1, Rules Regulating The Florida Bar

1-12.1 *Amendment to rules; notice.* Petitions for revision of or amendments to these Rules Regulating The Florida Bar, other than chapters 2, 7, and 9, will be entertained by this Court when presented by the board of governors or by not fewer than fifty (50) active members of The Florida Bar. Notice of intention to file such petition on a specified date together with a copy of the proposed amendment shall be published in The Florida Bar *News* not less than thirty (30) days prior to the filing of such petition. The Court will thereafter accept objections or comments on such petition.

APPENDIX C

Rule 2-3.3, Rules Regulating The Florida Bar

2-3.3 *Formula for apportionment of members of board of governors.* The formula for determining the number of representatives apportioned to and elected from each judicial circuit shall be as follows:

(a) Determine the median number of members in good standing residing in the judicial circuits ("the median circuit population") by (1) ranking the judicial circuits in order of the number of members in good standing residing in each circuit and (2) determining the number of members in good standing residing in the judicial circuit that is ranked exactly midway between the circuit with the largest number of members and the circuit with the smallest number of members or, if there is an even number of circuits, calculating the average membership of the two (2) circuits that are ranked midway between the circuit with the largest number of members.

(b) Apportion representatives among the judicial circuits by assigning to each judicial circuit the number of representatives equal to the quotient obtained by dividing the number of members in good standing residing in that circuit by the median circuit population and rounding to the nearest whole number.

(c) Determine the relative deviation of each circuit's proportionate representation from the median circuit population by (1) calculating the number of resident members per representative so apportioned, rounded to the nearest whole number, (2) subtracting from that number the median circuit population, and (4) converting the quotient so obtained to the equivalent percentile.

(d) Determine whether each circuit's relative deviation from the median circuit population would be reduced by adding or subtracting one representative, and, if so, add or subtract one representative as indicated.

(e) Assign one representative to each judicial circuit not otherwise qualifying for a representative under the calculations made in subparagraphs (a) and (b).

(f) If the total number of representatives assigned to the judicial circuits as a result of the steps set forth in subparagraphs (a) through (e), when added to the number of officers and other representative who are members of the board by virtue of the provisions of rule 1-4.1, would result in a board of more than fifty (50) voting persons, reduce the number of members of the board to exactly fifty (50) voting persons by (1) determining which judicial circuit among those to which more than one representative has been apportioned would have the smallest relative deviation from the median circuit population after the loss of one representative, (2) subtracting one representative from that circuit, and (3) repeating those two (2) steps as necessary until the total number of voting board members is reduced to exactly fifty (50).

APPENDIX D

Article XIII, Integration Rule of The Florida Bar (1986)

Amendments. Petitions for revision of, or amendments to, this rule will be entertained by the Supreme Court when presented by the Board of Governors or by not less than 25 active members of The Florida Bar. Notice of the filing of the petition shall be published in an issue of The Florida Bar *News* and it will proceed as an original proceeding under Florida Appellate Rules 9.030(a)(3) and 9.100. Except in an emergency, the court will not act on the petition within 20 days after the date of the publication. The court may upon good cause shown, waive the formal nature of the proceeding under the appellate rules and specify by order an informal procedure to be followed for such consideration including a means for interested parties to participate and be heard.